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THIS ISSUE IS DEDICATED AS A MEMORIAL.

WAIVER BY A MUNICIPAL CORPORATION OF THE RIGHT TO REGULATE RATES. — The regulation of rates charged by public service companies being a governmental function, the power of municipal corporations to exercise it depends, according to the orthodox view, upon legislative sanction.[1] The Supreme Court of the United States has held that where a municipal corporation has received such sanction but has no express authorization to contract as to rates, an agreement by the corporation not to regulate rates may be overridden by a later ordinance reducing them;[2] but that if there be also authorization to agree upon rates, then the later ordinance impairs the obligation of contract and is therefore invalid.[3] An ordinance of the latter kind was overthrown in the recent case of *City of Minneapolis* v.

[1] *In re* Pryor, 55 Kan. 724; Lewisville Natural Gas Co. *v.* State, 135 Ind. 49.

[2] Rogers Park Water Co. *v.* Fergus, 180 U. S. 624; Freeport Water Co. *v.* Freeport City, 180 U. S. 587; Omaha Water Co. *v.* City of Omaha, 147 Fed. 1.

[3] Los Angeles *v.* Los Angeles Water Co., 177 U. S. 558, 578; City of Cleveland *v.* Cleveland City Railway Co., 194 U. S. 517, 535, 536. See 16 HARV. L. REV. 1–21.

Minneapolis Street Railway Co., U. S. Sup. Ct., Jan. 3, 1910. And a like result has been reached where the agreement with the company merely fixed a maximum rate.[4]

Where there are two possible constructions of a franchise, the presumption should be in favor of the public;[5] hence it seems doubtful whether the fixing of a maximum rate ought to be regarded as an agreement not to regulate rates. The construction adopted by the Supreme Court is, however, supported by the weight of authority.[6] But even where there is a contract expressly waiving the right to reduce rates, the distinction taken by that court is open to the objection that it makes the validity of the contract, and so its impairment by a subsequent regulation, depend upon the express authorization of the municipal corporation, not only to regulate rates but also to make agreements concerning them. It is submitted that a municipality has the power to contract as an inherent attribute of its corporate character.[7] Whether or not it has the right as well as the power to contract in a given instance, should depend not upon express legislative authority, but upon those considerations which ordinarily determine the validity of a municipal contract. The agreement should be effectuated unless it furthers a purpose other than a public one;[8] or unless the power to enter into it is restricted by the legislature;[9] or unless it be against public policy.[10] In the absence of express legislative restrictions, such contracts as those under consideration are unobjectionable save, perhaps, on the last named ground.

Legislative regulation of rates charged by public service companies has been explained as an exercise of the police power.[11] That neither the State nor those to whom it has delegated its powers can by contract waive the right to enforce such well-defined police regulations as protect the health, safety, or morals of the community is well settled.[12] It seems, however, to be no longer open to doubt that a state may, by agreement in terms, waive its right to regulate rates.[13] It is submitted that the reason for this seeming inconsistency lies in the fact that the regulation of public service companies is not so much an exercise of the police power, as an exercise of the right to control employments affected with public interest.[14] The objections to con-

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[4] Detroit *v.* Detroit Citizens Street Railway Co., 184 U. S. 368, 389.

[5] Knoxville Water Co. *v.* Knoxville, 189 U. S. 434; Omaha Water Co. *v.* City of Omaha, *supra*.

[6] Pingree *v.* Michigan Central Railroad Co., 118 Mich. 314. *In re* Pryor, *supra*. But see Knoxville Water Co. *v.* Knoxville, *supra*.

[7] *Cf.* City of Noblesville *v.* Noblesville Gas Co., 157 Ind. 162; Ketchum *v.* City of Buffalo, 14 N. Y. 356; Town of Gosport *v.* Pritchard, 156 Ind. 400.

[8] Akin *v.* Bartow County, 54 Ga. 59.

[9] Gillette-Herzog Manufacturing Co. *v.* Canyon County, 85 Fed. 396; Jackson *v.* Bowman, 39 Miss. 671.

[10] City of London Lighting Co. *v.* City of London, 82 L. T. N. S. 530; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 249; State of Ohio *v.* Cincinnati Gas Co., 18 Oh. 263, 293.

[11] Munn *v.* Illinois, 94 U. S. 113.

[12] Beer Co. *v.* Mass., 97 U. S. 25; Mayor *v.* Second Ave. Railway Co., 32 N. Y. 261; Texarkana Gas Co. *v.* City of Texarkana, 123 S. W. 213 (Ark.).

[13] Stone *v.* New Orleans & Northwestern Railroad Co., 116 U. S. 352; Pingree *v.* Michigan Central Railroad Co., *supra*. See Georgia Banking Co. *v.* Smith, 128 U. S. 174. *Contra*, Laurel Fork Railroad Co. *v.* West Va. Transportation Co., 25 W. Va. 324.

[14] Lake Shore & Michigan Southern Ry. Co. *v.* Smith, 173 U. S. 684, 696. See 21 HARV. L. REV. 609.

tracting away this less fundamental and more recently established governmental function are evidently less cogent than in case of the police power, the exercise of which is the primary duty of the state. Furthermore, where the waiver is by a municipal corporation, since the state is not a party to the contract, there seems to be no basis, in spite of intimations to the contrary in the principal case, for regarding the state's power to regulate as also waived.[15] The latter power remaining intact, any objections to such contracts on the ground of public policy, are without foundation.

THE EXTRA-TERRITORIAL FORCE OF A DECREE BY A COURT OF EQUITY. — A decree affecting a foreign *res*, either positively or negatively, is often asked against the defendant in a court of equity. Since the court has jurisdiction by personal service,[1] with the resulting power to enforce the decree by an imprisonment of the person of the defendant, it can refuse to grant the relief sought only on the ground that it is inexpedient, or in violation of the principles of the conflict of laws, to interfere with property within the territory of a foreign sovereign. Thus relief has been given against a threatened tort to foreign property,[2] or against acts in foreign territory constituting a breach of contract.[3] Even such relief, however, involving as it does no positive act within a foreign territory, has been refused,[4] though only on the ground of inexpediency; for clearly no sovereign would object to an exercise of such slight control over his property. It has been suggested that a decree compelling the defendant to perform within the jurisdiction of the court an act which will interfere affirmatively with foreign property, such as the conveyance of foreign lands by a defendant trustee, may be justified by the implied consent of the sovereign whose territory is thereby affected.[5] But the fact that such a decree is recognized as valid under the full faith and credit clause of the Constitution of the United States [6] demonstrates that the sovereign rights of a state are not impaired by such jurisdiction. It is possible that cases involving slight extra-territorial action under the direction of the court might be justified by an implied consent; but any decree

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[15] *Contra*, 56 Fed. 339, 345. The state has been held bound by a franchise granted by a city. Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1. But the state is the real grantor of a franchise, so that there is no analogy to a contract. State, Hutchinson, *et al. v.* Belmar, 61 N. J. L. 443.

[1] Personal service is necessary when no *res* is within the jurisdiction. Wallace Wilson *v.* American Palace Car Co. of New Jersey, 65 N. J. Eq. 730.

[2] Alexander *v.* Tolleston Club of Chicago, 110 Ill. 65; Great Falls Mfg. Co. *v.* Worster, 23 N. H. 462; Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1; Munson *v.* Tryon, 6 Phila. 395; Jennings Bros. & Co. *v.* Beale, 158 Pa. 283; French *v.* Maguire, 55 How. Prac. (N. Y.) 471; Frank *v.* Peyton, 82 Ky. 150.

[3] Schofield *v.* Railway Co., 43 Oh. St. 571, 621.

[4] *Foreign torts:* Morris *v.* Remington, 1 Pars. Eq. (Pa.) 387; Atlantic Pacific Telegraph Co. *v.* Balt. & Ohio R. R. Co., 46 N. Y. Super. Ct. 377; Lindsley *v.* Union Silver Star Mining Co., 26 Wash. 301; Northern Indiana Ry. Co. *v.* Mich. Central R. R., 15 How. (U. S.) 233. As to trespass, see 15 HARV. L. REV. 579.

Breach of contract in foreign territory: Delaware L. & W. Ry. Co. *v.* New York S. W. Ry. Co., 12 N. Y. Misc. 230; W. U. Tel. Co. *v.* Western & Atlantic R. R., 8 Baxt. (Tenn.) 54; W. U. Tel. Co. *v.* P. A. Tel. Co., 49 Ill. 90.

[5] See 21 HARV. L. REV. 354.

[6] Massie *v.* Watts, 6 Cranch (U. S.) 148. The cases in state courts are collected in AMES, CASES IN EQUITY, p. 10, note 10.